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No. 89-684

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE SAMPLE, INC.,

Petitioner,

vs.

PENDLETON WOOLEN MILLS, INC.,

Respondent.

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. CERTIORARI IS URGENTLY NEEDED TO CORRECT MIS-USE OF SUMMARY JUDGEMENT

Respondent's brief quotes from a speech by Chief Justice Vinson to the American Bar Association (p. 6), but overlooks the most important part applicable in evaluating certiorari petitions, namely consideration of (69 S. Ct. vi-vii):

> ". . . the actual, practical effect of the disputed decision - its consequences for other litigants and in other situations. A petition for certiorari should explain why it is vital that the question involved be decided finally by the Supreme Court."

The Third, Fifth and Ninth Circuits have held as a matter of law that the presentation of direct evidence by the

non-moving party forecloses the grant of summary judgment.[1]

However, when presented with just such direct evidence, the Second Circuit ignored it without comment in affirming summary judgment.

Compliance with the requirements of Fed. R. Civ. P. 56 in dealing with summary judgment motions gives rise to issues of law. Such issues imperatively require the attention of this Court when, as here, the Second Circuit Court of Appeals is out of step with these requirements.

Otherwise, the most valuable right that party litigants have, that of a full and fair trial, will be subject to

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[1] Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc., 826 F.2d 1335 (3d Cir. 1987); Leonard v. Dixie Well Serv. & Supply, Inc., 828 F.2d 291 (5th Cir. 1987); McLaughlin v. Liu, 849 F.2d 1205 (9th Cir. 1988).

abridgement by the mis-use of summary judgment motions.

Footnote 4 of respondent's brief indicates that the decisions of the three Circuits involve three different areas of the law. Surely, however, the rule for dealing with summary judgment motions is not to be a different rule in each of the 40 to 50 branches of the law.

Further, one of the three cases, an antitrust case, Arnold Pontiac-GMC v. Budd Baer, Inc., 826 F.2d 1335 (3rd Cir. 1987), reversed summary judgment because direct evidence in opposition had been presented, even though the antitrust violations at issue did not themselves rise to the level of a price-fixing conspiracy such as is here involved.

The inconsistency between the instant case and Arnold Pontiac is particularly

important because the latter was decided by the Third Circuit following its consideration on remand of this Court's decision in Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

Thus, the Third Circuit's emphasis upon direct evidence as an important distinguishing factor from Matsushita is of particular significance both in that case and to the instant case. (826 F.2d 1335, 1338.)

Certainly it is vital for litigants to know whether there is or is not a rule that summary judgment is foreclosed by the presentation of direct evidence from the non-moving party.

In addition, the direct evidence here involved had a dual significance: it was not only evidence of the existence of a price-fixing conspiracy, but also of the

complete lack of credibility of the affidavits relied upon by the party moving for summary judgment.

The credibility issue raised by petitioner's countering affidavit is shown by the following statements from one such affidavit filed by petitioner (A-418):

> "4. In particular, Bishop III states, in paragraph 6, that 'I have never met with a retail account or potential account and sought or obtained from any account any assurance, agreement, or commitment that the account would charge any particular retail price or maintain any level of retail prices for Pendleton products.'
>
> "5. The foregoing statement is totally false. In January 1985, in the presence of my wife, Priscilla, and myself, Bishop III did with two accounts exactly what he swears not to have done.
>
> "6. One such incident occurred with Margot Luftig, the buyer at Altman's in New York City. At that meeting Bishop III directly discussed the retail pricing policies of Altman's

> and asked for a commitment that, if the store's ownership should change, Altman's would continue to use what are known as 'keystone' prices. Such an assurance was given to him by Miss Luftig at the meeting.
>
> "7. Also in January 1985, in our presence, Bishop II discussed, sought, and obtained the agreement of Pat Turner, the merchandise manager at Hahnes' department stores in New Jersey, to use 'keystone' prices in the future."

The foregoing statements directly implicate the National Sales Manager of Pendleton, C.M. Bishop III, in obtaining price-fixing agreements in the presence of the affiant and his wife.

We also ask the Court to examine the letters from the same C.M. Bishop III to retailers that are found at pages 48-50 in the "Confidential" Joint Appendix as further direct evidence that respondent did in fact do what its brief denied, namely, both seeking and obtaining

agreements with retailers to maintain retail price levels.

In addition, respondent attempts to disregard direct evidence in the form of a tape recording of a telephone conversation between two sales representatives on the ground that it is hearsay. (Br. n.5, p. 10.) This overlooks the fact that one of the two, Brown, also had a retail store dealing in Pendleton products, so that his statements are admissible as those of an agent and co-conspirator (Fed.R.Evid.801(d)(2)(D) &(E)), and that the personal knowledge affidavit of the other, Loveridge, was filed.

Judge Sand stated that "The Sample has . . . failed to show any agreement by retailers to abide by keystone prices." (Appendix to Petition, D-9.)

The statements from the affidavit quoted above show that Judge Sand's statement approved by the Second Circuit is simply wrong.

To return to the language of Chief Justice Vinson, it is of tremendous practical importance to litigants everywhere to know whether such abuse of summary judgment procedures on the part of the district courts is to be permitted.

II. MONSANTO IS MIS-CITED

At page 13, respondent cites to this Court its decision in Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761 (1984), but fails to mention the decision's most directly applicable language which refers specifically to activity of the kind shown by the direct evidence presented by petitioner.

What this Court in Monsanto indicated does constitute evidence of price-fixing that must go to the jury is that the retailer not merely acquiesced, but also "communicated its acquiescence or agreement, and that this was sought by the manufacturer." (465 U.S. at 764, n. 9; emphasis added.) Evidence satisfying both conditions was presented by petitioner, namely, that the acquiescence or agreement was communicated by the retailer, and that "this was sought by the manufacturer.", as shown in the affidavit quoted above. In such circumstances, it is submitted that summary judgment was required to be denied as a matter of law under the standards established by this Court in Monsanto.

Respondent's brief sets forth conclusory statements to the effect that

the district judge considered what was necessary on the part of the non-moving party, but fails to point out where in the decision the Court gave any consideration to petitioner's direct evidence in the record as set forth above.

Respondent seeks to make a point that the Profitability Plan, discussed at great length, "was not offered to Sample." (Br. 11) This is true for obvious reasons: Sample was not a party to the conspiracy, but a target of it.

The Profitability Plan offered bonus "offprice packages" as part of the deal to adhere to "regular prices" or key-stone prices.

Thus the Profitability Plan instead of being irrelevant, as contended by respondent, is itself direct evidence of the existence of a conspiracy.

Respondent also advances an argument that because petitioner is in the Buffalo area, the direct evidence produced by petitioner pertain to retailers in other areas.

However, it is not dispute that the conspiracy was nationwide in scope. The products manufactured and sold by respondent were distributed throughout the nation, as was the Profitability Plan. Retailers in the Buffalo area compete with new retailers in other regions in New York, Pennsylvania and Ohio. Further, at least one of petitioner's major competitors in the Buffalo area was itself part of a nationwide chain of department stores.

Respondent argues in its brief that a speech given by one of the top executives of respondent containing the phrase "and are in agreement" was made

solely to sales representatives. (pp. 11-12.) However, respondent (and the Second Circuit) ignores the fact shown in petitioner's direct evidence that some of those sales representatives themselves were retailers and further that other retailers, were also present and part of the same meeting. (A-462.)

III. RESPONDENT'S CONTENTIONS REGARDING CERTIFICATION LACK SUBSTANCE

Respondent contends that petitioner should have utilized motion procedure for certification of the question involving the applicability of New York antitrust law. (p. 14)

However, the frivolousness of this contention is exposed by footnote 8 in respondent's brief (p. 15), which admits that, under New York procedure, the New York Court of Appeals will not answer

questions certified to it "unless it is satisfied that the question is determinative of the case."

Thus, until the Second Circuit had ruled on the merits of petitioner's federal antitrust claim, a request for certification could not have been effectively made.

Further, as respondent acknowledges, petitioner did request certification in its initial brief. (p. 4)

That brief was written just eight days following this Court's seminal decision in California v. ARC America Corp., ____ U.S. ____, 109 S.Ct. 1661 (1989).

Not only was the last paragraph of petitioner's brief devoted to the subject of certification, but the brief also stated (pp. 49-50):

> However, if the Court is uncertain and regards the mat-

> ter unsettled because there is no controlling precedent of the New York Court of Appeals, we respectfully request that the question be certified for decision to the New York Court of Appeals pursuant to McKinney's New York Rules of Court § 500.17(b) (West 1989), a procedure recently followed by this Court in The Home Ins. Co. v. American Home Prods. Corp., ____ F.2d ____, No. 88-7995, 88-9059 (2d Cir. Apr. 7, 1989).
>
> Such a procedure might be deemed particularly appropriate in view of the increased importance give to antitrust remedies by state law as a result of the decision of the United States Supreme Court in California v. ARC America Corp., ___ U.S.___, 57 U.S.L.W. 4425, No. 87-1862 (April 18, 1989).

Additional citations of authority follow showing the basis for petitioner's belief that upon prior New York decisions, the matter should properly be determined under New York law. Thus the contention in respondent's brief (p.14) that the request for certifica-

tion was limited "merely by means of two sentences in [petitioner's] brief" is egregiously misleading.

In addition, under the "determinative of the cause" rule in New York (N.Y. Const. art. VI, § 3(b)(9) and N.Y. Code, Rule & Reg. 550.17, 22 NYCRR 550.17 of the New York Court of Appeals), the matter did not become ripe for certification until after the Second Circuit's affirmance of the dismissal of the federal antitrust claims. Petitioner thereupon promptly filed a Petition for Rehearing with the Second Circuit in which Point II was wholly devoted to the certification issue.

This was the only procedure then available to the petitioner. In view of the important public interest factors brought into play as a result of this Court's decision in California v. ARC

America, supra, the Second Circuit at a minimum should have articulated the reasons for its decision regarding the request for certification.

Respondent's brief cites Creative Trading Co., Inc. v. Larkin-Pluznick-Larkin, Inc., 148 A.D.2d 352, 539 N.Y.S.2d 1 (1st Dept. 1989). However, that case in fact supports petitioner's position. The discussion in the opinion indicates that the use of the Profitability Plan here involved would fall within the type of conspiracy that would be violative of New York law, and the Court specifically noted that ". . . a vertical restraint is encompassed by the Donnelly Act. See, Anheuser-Busch, Inc. v. Abrams, 71 N.Y.2d 327, 333 (1988)." (148 A.D.2d 352, 354, 539 N.Y.S.2d 1, 2, (1988).

It is obvious that use of the certification procedure in such cases by the various Circuits is of tremendous importance to litigants in general and to the proper and efficient administration of justice.

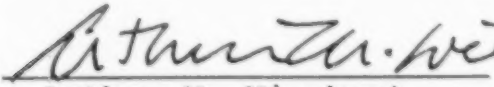
CONCLUSION

The petition for a writ of certiorari should be granted.

December 4, 1989

Respectfully submitted,

WISEHART & KOCH

By: 

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